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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 273

INTERNATIONAL ALUMINUM WINDOW CORPORATION, a Florida Corporation; AERO-VENT ALUMINUM WINDOW CORPORATION, a New York Corporation; and CHARLES I. GIRSCHOWITCH,

Petitioners,

—against—

TITO A. FERRI,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS

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Respondent does not deny that there is a substantial federal question involved herein. Respondent's position is that the federal question was not properly raised below.

On the other hand, the petitioners urge that the federal question was adequately raised and that the legal issues involved in this cause create questions which this Court, as a concomitant of its power to supervise the State Courts in that they may not infringe the constitutional rights of litigants, should take jurisdiction of by means of certiorari.

POINT I

The federal question was sufficiently raised in the Court below and its consideration was inherent in the Court's decision.

As one of the reasons why rescission should have been denied, the petitioner Girschowitch asserted below that he had expended substantial funds in reliance on the contracts and that rescission should not be granted without requiring the respondent to place him *in statu quo.* This right was summarily denied by the Florida Supreme Court (Petitioner's Brief, App. C, pg. 26). Thus were the petitioners deprived of their property without due process of law and in violation of their constitutional rights. This federal question therefore was before the highest Court of the State, its consideration was necessary to the determination of this cause and that the Florida Supreme Court judgment as rendered could not have been given without deciding it. Inherent in every proceeding before a State Court is the right of litigants to be accorded due process of law. State judicial action may result in a denial of due process. (*Shelley* v. *Kraemer,* 68 S. Ct. 836, 842, 334 U. S. 1, 14-16.)

All Courts take judicial notice of the Constitution of the United States and the raising of a federal question need not be in accordance with any particular form of words and phrases (*New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67) and if from a consideration of the record as a whole, it appears that the constitutional question did arise and the effect of the State's Court judgment was to deny petitioner's

consitutional rights, the jurisdiction of the Supreme Court can be invoked. (*Furman* v. *Nichol,* 8 Wall. 44, 56, 57.)

In the instant case the power of the State Court to decree the rescission of the three contracts without placing the petitioners *in statu quo,* though they had gone to considerable expense in making substantial effort to abide by the contracts, was argued at length and formed an integral part of the Court's opinion.

Also in *Rogers* v. *Alabama,* 192 U. S. 226, at pg. 230, the Court stated:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this Court will decide for itself whether a contract was made as well as whether the obligation has been impaired."

In addition, the petitioners could not be expected to anticipate that the Florida Court would deny them due process of law. Their former Attorneys, having raised the question of the *status quo ante* before rescission, could not petition for re-hearing below for the reason that they were precluded from so doing by Rule 25 of the Florida Supreme Court which precludes the assumption of any new ground or position than that used upon the original argument.

In this connection, attention is invited to the language of this Court in *Saunders* v. *Shaw,* 244 U. S. 317, at pg. 320.

> "The question remains whether the writ of error

> can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course, ordinarily, that would not be enough. But when the act complained of is the act of the Supreme Court done unexpectedly, at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for the infraction of constitutional rights if the party aggrieved in such a way could not come here."

Accord, *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 681, 682.

Even if, as respondent claims, the federal question is an independent issue, the actual infringement of the petitioners' rights by the State Court not having taken place until the decision of that Court, certiorari is the only means and this Court the only forum by which petitioners may protect their rights.

POINT II

The Supreme Court will review a State's Court finding where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it.

Respondent cannot escape the fact that the lower Court found that there was neither fraud nor misrepresentation on the part of the petitioners. Its decision, however, was based upon a finding of a

failure of consideration. The record clearly shows that the evidence is to the contrary. Accordingly, this finding rests on no fair or substantial basis.

While ordinarily the Supreme Court will not exert its jurisdiction merely to review a decision of a State Court upon a question of fact, nevertheless there are two major exceptions to the rule against reconsideration of findings of fact. The Supreme Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (*Fiske* v. *Kansas,* 274 U. S. 380, 385, 386.) Pursuant to the latter exception, the Court feels itself free to make an independent examination of the facts when necessary to decide whether a person has been deprived by a state court of a fundamental right secured by the Constitution. (*Norris* v. *Alabama,* 294 U. S. 587, 590.)

Also, this Court, in discussing a denial of Constitutional Protection by State Courts in the assertion of rights under local law, stated in *Demorest* v. *City Bank Farmers Trust Co.,* 64 S. Ct. 384, 388; 321 U. S. 36, 42:

> "* * * Whether the State Court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this

> Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded * * *."

Wherefore, it is urged by the petitioners that considering this case as a whole, taking into consideration its unusual circumstances, its peculiar nature, the substantial amount of money expended by Girschowitch and the unjust enrichment to the respondent who has now been declared to be the sole owner of the patent herein, this Court take jurisdiction since the decision of the Florida Supreme Court patently represents in its incorrectness a gross miscarriage of justice or at least a subtle erosion of a constitutional right.

CONCLUSION

For the reasons stated above and for the reasons set forth in the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM G. WALL,
Counsel for Petitioners.